SINGAPORE REPORTS

K.M.A. ABDUL RAHIM & ANOR. v. OWNERS OF "LEXA MAERSK" & ORS.

[O.C.J. (Choor Singh J.) August 31, 1973]
[Singapore — Consolidated Action in In Rem Admiralty Suits No. 109 of 1968, 1961 of 1968 and 2479 of 1968]

Carriage of Goods by Sea — Contract — Carriers — Bill of Lading — Damage to goods — Liability of carriers — Liability of lighterers whose lighters were used to carry goods from ships to godown — Bailees for reward — Duty of care — Applicability of Hague Rules — Meaning of "discharge".

Tort — Duty of care — Liability of lighterers whose lighters were used to carry goods from ship to godown.

These were consolidated actions in which the plaintiffs claimed damages in respect of damage to their goods which were shipped from Karachi to Singapore on board two ships owned by the first defendants. When the ships arrived in Singapore lighters belonging to the second defendants were used to carry the goods from the ship to the godowns. Evidence was given that the goods were damaged, by water. The evidence showed that in one case, the "Lars" cargo, the goods were damaged by sea water before it was unloaded from the ship and that in the other case, the "Jens" cargo, the goods were damaged by rain after the ship arrived in Singapore.

Held: (1) the first defendants as carriers were liable for the damage in respect of the "Lars" cargo as the evidence showed that the seawater damage occurred when the goods were on board the ship;

(2) the second defendants were liable for the damage caused to the plaintiff's "Jens" cargo, in which case the damage was caused after the ship arrived in Singapore, as they were subbailees for reward of the cargo and also because as lighterers they owed the plaintiffs a duty of care by reason of their proximity to the goods;

(3) the first defendants were also liable to the plaintiffs as the carriage by sea was not concluded and therefore the goods had not been "discharged". Under the Hague Rules, the first defendants were under a duty to properly and carefully care for the goods while they were in the lighters and as the damage to the goods resulted from lack of care on the part of the lightermen, the first defendants were liable for the damage;

(4) the first defendants were entitled to be indemnified by the second defendants in respect of the damage to the "Jens" cargo.

Cases referred to:-

(1) *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716.

(2) *Gilchrist Watt Ltd.* v. *York Products* [1970] 1 W.L.R. 1262, P.C.

(3) *Donoghue* v. *Stevenson* [1932] A.C. 562.

(4) *Lee Cooper Ltd.* v. *C. H. Jenkins & Sons Ltd.* [1967] 2 Q.B. 1.

(5) *East & West Steamship Co. Ltd.* v. *Hossain Brothers* [1968] 2 Lloyd's Rep. 145.

(6) *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastes Shipping Co. Ltd.* [1957] 2 Q.B. 233.

(7) *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.* [1927] 2 K.B. 432.

(8) *Pyrenene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402.

(9) *Peninsular & Oriental Steam Navigation Co. Ltd. & others* v. *Rambler Cycle Co. Ltd.* [1964] M.L.J. 443.

(10) *Goodwin, Ferreira & Co. Ltd.* v. *Lamport & Holt Ltd.* [1929] 2 All E.R. Rep. 623.

(11) *Falconbridge Nikel Mines Ltd.* v. *Chimo Shipping Ltd.* [1969] 2 Lloyd's Rep. 277.

(12) *The Winkfield* [1902] P. 42.

IN REM ADMIRALTY.

M. Karthigesu (*Harold Tan* with him) for the plaintiffs.

K. A. O'Connor for the first defendants.

K. E. Hilborne for the second defendants.

Choor Singh J.: These three consolidated actions were commenced by the plaintiffs in 1968 and in each of them they claimed damages in respect of the damage to their goods which were shipped from Karachi to Singapore on board two ships owned by Dampskibsselskabet AF 1912, Aktieselskab (hereinafter referred to as the first defendants). Vayna Suppiah & Sons (hereinafter referred to as the second defendants) are lighterers and their lighters were used to convey the said goods from the said ships, when they were anchored in the outer roads, to the Port of Singapore Authority godowns.

The facts are these. Under seven bills of lading, particulars whereof are given in the plaintiffs' statement of claim, there were shipped from Karachi, in apparent good order and condition, nylon piece goods on board the vessel "Lars Maersk" for carriage to and delivery at Singapore. These seven bills of lading are the subject matter of the In Rem Admiralty Suit No. 109 of 1968 which is against the first defendants.

Under two bills of lading, particulars whereof are given in the plaintiffs' statement of claim, there were shipped from Karachi, in apparent good order and condition on board the vessel "Jens Maersk", 400 bales of bleached white cotton cambric and nine cases containing 12,802 yards metallic fancy shirting for carriage to and delivery at Singapore. These bills of lading are the subject matter of Suit No. 2479 of 1968 which is against both defendants.

The third Suit is No. 1961 of 1968 which is against the second defendants for damages for breach of duty and negligence in the carriage of the aforesaid goods.

The "Lars Maersk" and the "Jens Maersk" are sister ships owned by the first defendants who also own the "Lexa Maersk" which was seized by the plaintiffs in Singapore and released upon a guarantee in lieu of bail having been given by the first defendants.

The "Lars Maersk" arrived in Singapore on or about the 29th November 1967 and anchored in the outer roads of the eastern anchorage from where all the cargo deliverable at Singapore was unloaded into the second defendants' lighters and conveyed to the Port of Singapore Authority wharves and discharged into Godown No. 19 for the purpose of delivery.

The "Jens Maersk" arrived in Singapore on or about the 24th December 1967 and anchored in the outer roads of the eastern anchorage from where all the cargo deliverable at Singapore was unloaded into lighters and conveyed to the Port of Singapore Authority wharves and discharged into Godowns 20 A/D and R for the purpose of delivery.

On the 4th and 5th January 1968 the agents of the plaintiffs went to P.S.A. Godown No. 19 for the purpose of taking delivery of the said goods ex the "Lars Maersk" and found that almost all the wooden packing cases in which the said goods were packed showed external dry stains and some external damage.

They called for a survey before taking delivery and after a joint survey they took delivery of 121 cases of the said goods. On these 121 cases being opened internal dry stains were found in the wooden packing cases and the goods were all stained throughout to varying degrees. The plaintiffs contended at the trial that the staining of the wooden packing cases and of the goods were caused by sea water and the extent of sea water damage was claimed to be sixty-five per cent.

On the 17th January 1968 the agents of the plaintiffs went to P.S.A. Godowns 20 A/D and R for the purpose of taking delivery of the goods ex the "Jens Maersk" and found that some of the bales covered by the bill of lading No. 10 were dry stained and most of the wooden cases in which the metallic fancy shirting covered by the bill of lading No. 53 were packed were externally dry stained and damaged. They called for a survey before taking delivery and after a joint survey they took delivery of the 400 bales and the nine cases covered by bills of lading Nos. 10 and 53 respectively. When these 400 bales and nine cases were opened and further examined it was found that the contents of 65 bales were dry stained and five out of the nine cases were internally dry stained and their contents were also dry stained in varying degrees. The plaintiffs contended at the trial that the staining of the contents of the said 65 bales and of the contents of the five cases was caused by sea water and the extent of the sea water damage was claimed to be sixty-five per cent.

The plaintiffs claimed for breach of contract the sum of $108,233.44. Alternatively they claimed damages and interest and costs.

The plaintiffs' case was that by the terms of the bills of lading the first defendants had acknowledged that the said goods had been shipped on board their vessels in apparent good order and condition unless otherwise indicated thereon; that there was no statement in any of the said bills of lading to the effect that the said goods when shipped on the "Lars Maersk" and "Jens Maersk" were otherwise than in apparent good order and condition; that the first defendants by the terms of the said bills of lading undertook to deliver the said goods in the same good order and condition as they were in when shipped; that it was the duty of the first defendants to deliver the said goods in the same good order and condition as they were in when shipped and that they had failed to do so.

The plaintiffs claimed that the second defendants as lighterers were the agents of the first defendants and whether the sea water damage occurred during the ocean carriage or during the lighter carriage the first defendants were nonetheless liable in damages to the plaintiffs.

The plaintiffs also contended that if, which they did not admit, the liability of the first defendants ceased on the goods being unloaded into the lighters of the second defendants from the vessels "Lars Maersk" and "Jens Maersk" in the outer roads of the eastern anchorage and the sea water damage to the goods occurred during the lighter carriage, it was the duty of the second defendants to exercise due care and diligence in conveying the said goods from the side of the "Lars Maersk" and "Jens Maersk" respectively and discharging the said goods into the godowns of the P.S.A. The plaintiffs claimed that in breach of the said duty the second defendants did not safely or securely convey the goods from the side of the "Lars Maersk" and "Jens Maersk" and discharge the goods into the godowns of the P.S.A. and by their want of due care and diligence allowed the said goods to be damaged by sea water in consequence of which the second defendants were liable for the damage caused to the goods.

The first defendants denied that any damage occurred while the goods were in their custody. They contended that if such damage did occur, then it occurred while the goods were in the custody of the second defendants or of the Port of Singapore Authority or of the plaintiffs.

The first defendants denied that the second defendants were their servants or agents. They contended that the second defendants were independent contractors for whose negligence they were not responsible.

The first defendants claimed that their liability, if any, ceased when the goods were discharged from their vessels.

The second defendants denied that the goods were damaged by sea water or at all while being loaded into, carried or discharged from their lighters. They denied that the goods were damaged by sea water or at all during conveyance from the vessels to the wharves of the P.S.A. They maintained that they did not owe any duty to the plaintiffs, contractual, or otherwise, and that if they did owe any such duty, they were not in breach of it.

The first defendants having disputed the plaintiffs' claim on the aforesaid grounds, asserted that in the event of their being held liable to the plaintiffs, they were entitled to be indemnified by the second defendants against the plaintiffs' claim. In the alternative, they claimed that they were entitled to damages for breach of contract and/or duty on the part of the second defendants, such damages to include any damages and interest awarded to the plaintiffs and all costs incurred by the first defendants in defending this action.

The first defendants' case against the second defendants was that the second defendants having been engaged as independent contractors, it was an express and/or implied term of their engagement that they would convey the goods with reasonable care and skill and deliver them at the wharves or godowns of the P.S.A. in the same order and condition as they were in when they were delivered from the vessel into the custody of the second defendants. The first defendants claimed that the goods were delivered from the vessels into the custody of the second defendants in good order and condition and were subsequently conveyed from the side of the said vessels to the wharves of the P.S.A. in the second defendants' own lighters. The first defendants claimed that if, which they did not admit, the goods were damaged when they were delivered to the said wharves of the P.S.A., the

second defendants were in breach of the aforesaid implied term and/or were negligent and/or in breach of duty. They cited the following particulars of the second defendants' breach of duty and/or negligence: —

1. Failing to take adequate steps to protect the goods against loss or damage by rain and/or by sea water.
2. Allowing the goods to be loaded on to their lighters and/or remain uncovered thereon when rain and/or discharge of water from the ship's side was likely to occur. And the ocean carriers will rely upon the maxim *res ipsa loquitur*.

The second defendants denied that the goods were in good order and condition when they were delivered into their lighters. They denied that the damage to the goods arose from any breach of any implied term or negligence or breach of duty on their part.

A number of witnesses were called on both sides and lengthy submissions were made on behalf of all three parties. Both defendants strenuously denied liability. I accepted the evidence of the witnesses called by the plaintiffs, namely, Oh Kean Hock (PW1), M. A. Abdul Majid (PW2), Capt. Rivers (PW3), Dr. Walter Rintoul (PW4) and Frederick Jones (PW5). In my opinion they were all speaking the truth. Indeed there was no suggestion that any of them was not speaking the truth.

As far as the "Lars" cargo was concerned there was incontrovertible evidence, namely, the report of Herring & Co. a well-known firm of professional cargo surveyors, to the effect that the contents of all the 121 cases were "subjected to contact with sea water, most probably during transit". On page 3 of their report they stated: —

"All the above cases were superficially examined whilst being collected by the consignees from the P.S.A. Godown No. 19. The carrier's agents representative, Mr. Charlie, made a brief attendance but did not remain throughout the inspection. In view of the condition of the cases which were externally dry stained with some showing evidence of external damage, samples of their contents were drawn at random from cases and were submitted to a salinity test by precipitation which proved positive. Subsequently these samples were submitted for analysis to confirm cause of damage and the following is an extract from the analytical report.

ANALYSIS

PM	5.8	Sodium	Present
Chlorides	Present	Potassium	Present
Sulphates	Present	Magnesium	Present
Bromides	Present	Calcium	Present

Analysis of the above sample submitted showed the presence of the major elements of sea water in the correct proportions.

We were instructed to carry out a detailed examination of the contents of the cases. This inspection was effected at the consignee's premises. Each case was opened in our presence and the contents verified against the Packing Lists. The damaged pieces were carefully examined and the nylon cloth was noted to be stained throughout to varying degrees. The affected pieces were found to be, generally speaking, adjacent to the dry stained planks. The middle sections of the cases were, in most instances, dry, as a consequence of which a number of pieces were accepted as being in good condition."

The total yardage affected was certified by Herring & Co. as 93,748 yards and although the plaintiffs requested them to certify 65% loss based on the insured value, they expressed the opinion that there was a 50% loss in sales value which should also cover the cost of reconditioning the material.

It is true that J. C. Jones who made the survey was not called by the plaintiffs and counsel for the first defendants made much of this fact. He complained that he was deprived of the opportunity of cross-examining Jones. That is true but the fact remained that Herring & Co.'s report was proved by the plaintiffs in accordance with the Evidence Act and it was admissible in evidence. The first defendants have only themselves to blame for not being able to present any counter evidence. Before the plaintiffs took delivery they detected that there was something wrong with their goods and they informed the first defendants that they were going to have a survey carried out. They asked the first defendants to send a representative to witness the survey. The first defendants did send a Mr. Charlie but he refused to stay and witness the survey. It would appear that the first defendants were not interested in the matter. Nor were they or their representative present at the subsequent detailed examination of the damaged goods carried out at the plaintiffs' premises at 88, High Street, Singapore. In consequence the first defendants were unable to challenge the report of Herring & Co. There was no suggestion that it was a false or a fraudulent report. As pointed out by their counsel, the plaintiffs acted perfectly above board and gave the first defendants a reasonable opportunity to witness the survey so that they could see the extent of the damage and bring in their own independent surveyor if necessary. Herring & Co.'s report when considered together with the evidence of Dr. Rintoul clearly substantiated the claim of the plaintiffs that 93,748 yards from the 121 cases were damaged by sea water.

It must also be borne in mind that when the first defendants received the plaintiffs' claim based on the Herring report, they did not question it, challenge it or call for a further survey of their own. Furthermore, the first defendants were fully aware of the standard practice applicable in the survey of damaged cargo in Singapore. The external examination is always made at the P.S.A. godown and the detailed examination at the consignee's premises. As stated earlier, the first defendants were just not interested in the matter. If they were they should have taken steps to be present at both surveys. In my judgment, the report by Herring & Co. on the "Lars" cargo, which report I accepted as true, was under the circumstances of the case, conclusive evidence that the said cargo was damaged by sea water.

I accepted the evidence of Capt. Rivers and agreed with his opinion, for the reasons given by him, that the 121 cases were damaged by sea water before they were off loaded from the "Lars Maersk". If sea water had come into contact with the 121 cases in the lighters in Singapore, some sign of wet stains would have been noted. It was unlikely that wet stains would go unnoticed when the 121 cases were unloaded from the lighters. Furthermore, the plaintiffs' goods were all mixed up with goods of all other consignees in three different lighters in Singapore and as only the plaintiffs' goods were found to be damaged by sea water, it follows that the plaintiffs' goods must have come in contact with sea water before they were put

into lighters in Singapore. As the bills of lading did not disclose any external damage or staining of the cases and there was in that regard no letter of indemnity issued by the shippers to the first defendants, it follows that the damage by sea water must have occurred on board the "Lars Maersk" during transit from Karachi to Singapore.

Counsel for the first plaintiffs submitted that the evidence of Ho Chin Cheow (DW2) who surveyed the goods from the ship to the lighter, the evidence of Lim Teck Whatt (DW3) who was the surveyor when the goods were carried from the lighter into the P.S.A. godown and the P.S.A. inward surveyor's report all negatived any external stains on the 121 cases. The evidence showed that Ho was the only survey clerk on board the "Lars Maersk". He had to note the damage, that is, breakages, tears and stains when the goods were being discharged into two lighters simultaneously and from different hatches. He made the most perfunctory inspection of the goods for stains. As regards Lim who was the surveyor on the wharf when the goods were being taken out of the lighter and carried into the P.S.A. godown, again he was the only surveyor who had to take note of goods coming out of two lighters. Most of the time he was in the godown surveying the damaged goods which were brought into the godown on separate pallets. The separation of the damaged from the undamaged goods was done by the port labourers on the wharf apron and they were more concerned with separating the broken cases and torn bales from the unbroken cases and untorn bales. They were not looking for external stains. The same applies to the P.S.A. surveyor. The fact that these three persons did not record stains in their reports does not go to prove that the contents of the cases were not stained by sea water.

Counsel for the first defendants submitted that there was no certainty of whether the dry sea water stains were or were not on the cases at Karachi; that the goods were packed in second-hand cases and that the plaintiffs must show that when the goods arrived in Singapore, the exterior of the cases showed damage of the kind that would not have been apparent at the port of loading. In my judgment the plaintiffs were perfectly entitled to rely on the bill of lading and if it was the first defendants' case that the goods were damaged before shipment, it was for them to prove it.

As stated earlier, there being no other evidence of the condition of the contents of the 121 cases, the Herrings report was conclusive evidence that the said 121 cases which arrived on the "Lars Maersk" were damaged by sea water. In my judgment, on the evidence in this case, it was more probable than not, that the sea water damage occurred when the goods were on board the "Lars Maersk".

As regards the monetary loss suffered by the plaintiffs in respect of the "Lars" cargo, counsel for the first defendants submitted that there was no evidence as to how the surveyor from Herrings arrived at 50% damage and also that the plaintiffs had not shown at what price they sold these damaged goods. The plaintiffs were claiming 65% damage and one of them, namely Abdul Majid, was in the witness box for two days and not one question was put to him to challenge his claim of 65%. The assessment of 50% damage was quite obviously based on the extent of damage the surveyor from Herrings saw with his own eyes and this was borne out by the evidence of Capt. Rivers who explained the method by which Herrings normally assessed the value of damaged cargo. I found no reason for rejecting the assessment of 50% damage certified by Herring's surveyor and I accepted it as correct. The plaintiffs had given evidence of the sound value of their goods which was not challenged. They were therefore awarded 50% of the sound value of the "Lars" cargo and this amounted to $56,298.80. They were also awarded interest at 8% per annum from the 7th October 1968.

As regards the "Jens" cargo, there was overwhelming evidence and it was freely admitted by the second defendants and corroborated by the P.S.A. survey report that rain fell on the goods while they were in the lighters in Singapore. Counsel for the second defendants submitted that the second defendants were not liable on two grounds: First, he contended that as the plaintiffs' pleadings alleged that the damage was caused by sea water and there was no evidence whatsoever that the damage was caused by sea water, the plaintiffs could not succeed. The second ground on which liability was denied was that there was very heavy rain on the relevant dates and that in the circumstances the plaintiffs could not succeed unless they proved negligence on the part of the second defendants. Counsel submitted that there was "not one scintilla of evidence in this case" that the second defendants had been negligent. Counsel claimed that such a busy port as Singapore could not do its work if work has to stop every time dark clouds appeared on the horizon.

As regards the first submission of counsel for the second defendants, the claim against his clients was based on breach of duty and as far as their liability was concerned, it did not matter whether the goods were damaged by sea water or rain water. The crucial point was that the goods had been damaged by water while in their custody. Furthermore counsel for the plaintiffs applied to amend paragraph 13 of his statement of claim by striking out the word "sea". I did not consider this necessary. Had it been necessary I would have allowed the amendment. The real question was, as far as the second defendants were concerned, whether or not there had been a breach of duty on their part. The second defendants, as sub-bailees of the plaintiffs' goods were under a duty to take care of them during the time the goods were in their physical possession and to deliver them in the same order and condition in which they had received them. By allowing the goods to get wet, they were clearly in breach of this duty. In my opinion the unprecedented rain during the relevant period and the sudden showers which fell when the goods were in the lighters did not absolve the second defendants from liability. Had they been fully prepared and vigilant — and they should have been because they knew that there was continuous rain over the relevant period, the goods would not have got wet when they were in their custody. The fact that it took half an hour to shelter the goods in two lighters when rain came speaks for itself. In my opinion the goods could have been

guarded against damage by rain water by the crew of the lighters by the exercise of reasonable care and precaution. I rejected the defence of "act of God" raised by counsel for the second defendants in his submissions because it had no application in the circumstances of this case. In my judgment, the second defendants were clearly in breach of duty and were therefore liable for the damage caused to the plaintiffs' goods ex "Jens Maersk".

As regards the monetary loss to the plaintiffs in respect of their "Jens" cargo, it was again submitted by both defendants that there was neither evidence of the extent of the damage nor as to the amount the damaged goods fetched when sold by the plaintiffs. The plaintiff Abdul Majid stated in his evidence that 93,600 yards of cloth contained in 65 bales were damaged. The Anglo-American survey report at Bundle 'C' page 170 confirms that 65 bales were damaged. Abdul Majid also stated that 5,592 yards of fancy shirting was damaged. He stated that this material was measured by his staff at his premises at 88 High Street, Singapore. He also claimed $147.50 for four pieces of metallic fancy shirting which was short delivered. All this evidence was not challenged by either the first defendants or the second defendants. Here again, the plaintiffs' claim was for 65% damage in respect of the damaged material. Abdul Majid was not questioned on this figure. As the plaintiffs had also claimed 65% damage in respect of the "Lars" cargo which had in fact been examined by Herring & Co. who were able to certify only 50% damage, which assessment I accepted as correct, I was of the opinion that on the same basis it was fair and reasonable in the circumstances to allow the plaintiffs only 50% damage in respect of the "Jens" cargo instead of the 65% damage claimed by them. Accordingly the plaintiffs were entitled to $26,845 as damages in respect of their "Jens" cargo. They were also entitled to interest at 8% per annum from the 7th October 1968.

As the second defendants were sub-bailees for reward of the plaintiffs' "Jens" cargo, they were both on principle and authority liable for the damage caused to the plaintiffs' goods. The principal modern authority as to the liability of a sub-bailee to the first bailor is *Morris* v. *C. W. Martin & Sons Ltd.*,[1] where a mink stole sent by the plaintiff to a furrier to be cleaned was, with the consent of the plaintiff, sent on to the defendants as cleaning specialists for them to clean it under a contract between them and the furrier. The mink stole was stolen by a servant of the defendants whose duty it was to clean it. It was held that the defendants had a non-contractual liability to the plaintiffs. Lord Denning M.R. after citing a passage from *Pollock and Wright* on Possession, said at page 729: —

"By which I take it that if the subbailment is for reward, the sub-bailee owes to the owner all the duties of a bailee for reward: and the owner can sue the sub-bailee direct for loss or damage to the goods; and the sub-bailee (unless he is protected by any exempting conditions) is liable unless he can prove that the loss or damage occurred without his fault or that of his servants."

Diplock L.J. said at page 731: —

"Duties at common law are owed by one person to another only if there exists a relationship between them which the common law recognises as giving rise to such duty. One of such recognised relationships is created by the voluntary taking into custody of goods which are the property of another. By voluntarily accepting from Beder the custody of a fur which they knew to be the property of a customer of his, they brought into existence between the plaintiff and themselves the relationship of bailor and bailee by sub-bailment. The legal relationship of bailor and bailee of a chattel can exist independently of any contract...."

Salmon L.J. said at page 737: —

"When the defendants received the plaintiff's mink stole from the furrier, Beder, for cleaning, they knew that this stole did not belong to him but to one of the customers. They did not know the customer's name. Nevertheless by taking the fur into their possession in these circumstances they became bailees to the plaintiff for reward."

The decision in *Morris* v. *C. W. Martin & Sons Ltd., supra,* was considered with approval by the Judicial Committee in *Gilchrist Watt Ltd.* v. *York Products.*[2] In that case two cases of clocks were shipped from Hamburg for delivery to the plaintiffs at Sydney. On arrival of the ship at Sydney the goods were unloaded and stacked into a shed on the wharf by the defendants who were the ship's agents and stevedores. When the plaintiffs' agents sought to take delivery of the two cases, one was missing and was never found. The plaintiffs sued the defendants for damages on grounds of negligence. On the question whether the defendants owed the plaintiffs a duty of care as bailees, it not being contested that if the defendants had exercised reasonable care the loss would not have occurred, it was held that although there was no contractual relation or attornment between the defendants and the plaintiffs the defendants by voluntarily taking possession of the plaintiffs' goods assumed an obligation to take due care of them and were liable to the plaintiffs for the failure to do so. Lord Pearson who delivered the judgment of the Judicial Committee, after reviewing the authorities, observed at page 1270: —

"Both on principle and on old as well as recent authority it is clear that although there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiffs' goods in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so (as found by the trial judge). The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this the obligation is created by the delivery and assumption of possession under a sub-bailment. In the English courts the word 'bailment' has acquired a meaning wide enough to include this case. It may not have acquired such a wide meaning in the Australian courts. It is to be observed, however, that there is no express reference to bailment in count 3 of the particulars of claim on which the plaintiff succeeded. On a reasonable construction of that count this case falls within it. The plaintiffs have rightly succeeded in their action."

The second defendants were also liable on another ground to make good the loss suffered by the plaintiffs. Independently of any bailment, the second defendants as lighterers owed the plaintiffs a duty of care under the well-known doctrine of *Donoghue* v. *Stevenson*,[3] by virtue of their proximity to the goods. This is clear from the decision in *Lee Cooper Ltd.* v. *C. H. Jenkins & Sons Ltd.*[4] In that case the plaintiffs, a firm in England, ordered goods from New York. When the goods arrived in England, the plaintiffs instructed the Anglo-Overseas Transport Co. Ltd. who carried on business as shipping, forwarding and customs agents in London, to clear the goods through the customs and place them in a warehouse pending shipment to Eire. Anglo-Overseas in turn instructed the defendants, trans-

port contractors, to provide a vehicle to collect the plaintiffs' 38 cartons of goods from the docks and to deliver them to the Anglo-Overseas Transport warehouse five or six miles away. The defendants' driver collected the goods from the dock but, when some three miles from the warehouse, he left the lorry, unattended and unlocked, on the road and went into a cafe for a cup of tea. The lorry was stolen and when recovered was found to contain only 19 cartons. In an action by the plaintiffs against the defendants for loss of goods, it was held that since the defendants knew that the goods were the plaintiffs', they owed to the plaintiffs a duty of care in respect of them and since, in the circumstances, the defendants could reasonably have foreseen the loss which in fact occurred, they were liable to the plaintiffs for the value of the stolen goods. Marshall J. in considering whether the doctrine in *Donoghue* v. *Stevenson* applied to the facts of the case, said at page 9: —

"The test is not one of physical proximity but of foresight. Care must be taken to avoid acts or omissions which can be reasonably foreseen would be likely to injure your neighbour, who is a person who should be reasonably in contemplation as being so affected when directing the mind to the acts or omissions called in question."

In the present case the second defendants were bailees for reward of the plaintiffs' goods. They knew from an extended period of dealings with the first defendants' local agents, that the goods which were unloaded from the "Jens Maersk" and placed in their lighters, belonged to consignees and not to the first defendants or their local agents. They may not have known the names of the consignees but that in my opinion is irrelevant. In my judgment, on the facts of this case, the plaintiffs come within the ambit of the abovementioned test. The defendants owed a duty of care to the consignees of the goods, *i.e.* the plaintiffs. That duty was breached by serious negligence which resulted in loss to the plaintiffs. The second defendants must make good the loss suffered by the plaintiffs.

Were the plaintiffs entitled to recover damages from the first defendants in respect of the "Jens" cargo? That was the next question that I had to decide. Counsel for the first defendants submitted that the second defendants were independent contractors; that the first defendants were not responsible for the lighterage phase and that the contention that the first defendants were liable for the damage to the "Jens" cargo was untenable. Counsel further submitted that the plaintiffs could only succeed against the first defendants under the Hague Rules; that these Rules had not been proved to apply in this case because there was no evidence in this case of Pakistan law and that furthermore it has never been expressly decided that the ship is responsible for the lighterage phase under the Hague Rules, assuming that they applied.

The Hague Rules have been adopted by Pakistan by virtue of the Indian Carriage of Goods by Sea Act 1925 which appears in Pakistan's Statute Book with "Pakistan" substituted for "British India". See *Carver* on Carriage by Sea, 12th edn. vol. 2, page 1522, art. 1619 and the note at the bottom of the page. See also the Pakistan Supreme Court case of *East & West Steamship Co. Ltd.* v. *Hossain Brothers*.[5]

It was contended that the transit covered by the bill of lading and the carrier's responsibility for the due performance of his contract had come to an end when the goods were discharged into the lighters at Singapore and that the Hague Rules did not apply after that stage. In my view, the obligations of the first defendants did not cease when the goods were discharged into lighters. No doubt it is possible to terminate the carrier's obligations at this point, by including an appropriate stipulation in the bill of lading, but I can see nothing to that effect in the present bills of lading. There are, it is true, certain provisions which purport to exclude the carrier's liability for loss or damage whilst the goods are in lighters. See clauses 6, 10, 11 and 26. These are however mere exempting clauses. Their function is to protect the first defendants from liabilities which would otherwise have fallen on them by virtue of their possession of the goods under the contract of carriage, and they do not go so far as to provide that whilst the goods are in the lighters they are not at all in the carrier's possession under the contract. This being so, the carrier's primary obligation to deliver the goods to the consignee — an obligation created by the "shipped" clause on the front of the bill of lading — remained in force throughout the period when the goods were in the lighters. Accordingly, the first defendants still retained responsibility for the goods whilst they were in the lighters.

The next question that I had to consider was, to what extent, if any, were these responsibilities modified by the Hague Rules and the exempting provisions of the bill of lading. The Rules apply to all operations which the carrier has undertaken to perform in relation to "loading, handling, carriage, custody, care, stowage and discharge" of the goods. It follows that no matter what obligations the carrier may undertake to perform at the port of destination, the Rules cannot continue to apply after the completion of "discharge". This was emphasised by Devlin J. in *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastes Shipping Co. Ltd.*,[6] at page 251 when he said: —

"The Act is concerned (see section 1(e)) with the period beginning with the loading and ending with the discharging of the goods."

And Wright J. in the earlier case of *Gosse Millard* v. *Canadian Government Merchant Marine, Ltd.*,[7] expressed a similar view when he said, at page 434: —

"The word 'discharge' is used, I think, in place of the word 'deliver' because the period of responsibility to which the Act and the Rules apply (Art. I(e)) ends when they (the goods) are discharged from the ship."

I now come to the most difficult question of law that arose in this case and related to it were two other questions which were equally crucial. What is meant by the word "discharge"? When was the discharge of the goods completed in this case? Was the lighterage phase a part of the discharge operation? In this connection the following comment is found in *Scrutton* on Charter-Parties, 17th edn. (1964) at page 409: —

"It has not yet been decided whether the use of the word 'ship' has the effect of excluding from the 'carriage of goods by sea' to which the Rules relate the lightering of goods out to a ship at the port of loading or their removal to shore by lighter at the port of discharge. If the carrier undertakes to perform these operations it seems possible that they might be considered as part of loading and dis-

charging respectively. If he does not, it seems probable that the Rules would have no application to these operations: the terms of Art. I(d) lend some support to this view."

In the old days discharge meant "release of the goods from the tackles of the ship" or "free from the ship's tackles". That is not so now. As was observed by Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[8] at page 419, "... the ship's rail has lost much of its nineteenth century significance..." This observation has been amply borne out by several later cases.

Although the word "discharge" may, as observed by Wright J., appear at first sight to have been used in place of the word "deliver", it has been shown in a later case that the persons responsible for the drafting of the Hague Rules used the word "discharge" deliberately and they did so in order to distinguish between the obligations which the shipowner undertakes in his capacity as carrier by sea and those which rest upon him after the conclusion of the sea carriage simply because he is in possession of the goods. This distinction was clearly brought out by Wee Chong Jin C.J. in his judgment in *Peninsular & Oriental Steam Navigation Co. Ltd. & Ors.* v. *Rambler Cycle Co. Ltd.*,[9] where he stated at page 450: —

"... The operation of discharge is different from the operation of delivery. If the intention and object of the Hague Rules were to also provide for the responsibilities and liabilities, rights and immunities of a carrier in relation to the delivery of goods under a contract of carriage of goods by sea to which the Hague Rules apply, nothing would have been simpler than to insert the word 'delivery' after 'discharge' in Art. II...."

It was held in that case by the Federal Court of Malaysia that as the goods had been discharged from the ship and placed in storage in a godown, the discharge operation was clearly over and that the liability of the carrier which it was sought to enforce for wrong delivery, arose after the expiration of the period during which the Hague Rules applied.

The earliest case, after the coming into operation of the Hague Rules, which throws some light on the meaning of "discharge", as used in the said Rules, is *Goodwin, Ferreira & Co. Ltd.* v. *Lamport & Holt, Ltd.*[10] This case concerned a consignment of cotton yarn which had been safely placed by the ship's tackles into a lighter at the port of destination. Following that, a case containing heavy iron pipes was raised from the hold by the ship's tackles to be put into the same lighter. While being lowered the bottom of the case broke and the pipes fell into the lighter and holed it. Sea water entered and damaged the cotton yarn. Roche J. held that the carrier was liable because the cotton yarn had not been "discharged" from the ship within the meaning of the Hague Rules. He said, at page 625: —

"In my judgment, the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the load which was to start for the shore. When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of Art. I(e) and Art. II in the schedule to the Act of 1924, is, in my judgment, going on so long as other goods are being raised into the lighter and stowed in the lighter alongside or on top of them."

This does not appear to be a very convincing case but it shows that the Hague Rules have been applied to a situation where the goods had been released from the ship's tackles. The decision was referred to, apparently with approval, by Devlin J. in *Pyrene* v. *Scindia Navigation Co. Ltd.*, *supra*, where he stated, at page 418: —

"If loading under the Rules does not begin before the ship's rail, by parity of reasoning, discharging should end at the ship's rail; but so to hold would be contrary to the decision of Roche J. in *Goodwin, Ferreira & Co. Ltd.* v. *Lamport & Holt Ltd.*"

There are two other reported cases which throw some light on the meaning of "discharge". First, there is the decision of the Supreme Court of Pakistan in *East & West Steamship Co.* v. *Hossain Brothers & ors.*, *supra*, which was cited by counsel for the plaintiffs. In this case the problem raised was somewhat similar to the one raised in the present case. The parties had agreed that the damage was caused when the goods were in a lighter after discharge from a vessel at Chittagong. Evidence was given that the lighter had no fixed cover to protect the cargo. The shipowner contended that under the conditions of the bills of lading, the liability ceased once the goods were "free of ship's tackle"; that, under art. I(e) of the Hague Rules, sea transit ended as soon as goods were put into the lighter; and, further, that the damage occurred outside the period of carriage by sea. The plaintiff's claim was allowed by the subordinate judge and the defendant's appeal was dismissed by the Pakistan High Court. The defendant appealed to the Supreme Court. It was held by the Pakistan Supreme Court that the carriage of goods under the Hague Rules did not cease when the goods were discharged from the ship and placed in the lighter; that the shipowner was under a duty to see that the lighter was seaworthy and properly equipped for the purpose; that the lighter was not properly equipped for reception of the goods and therefore the shipowner was guilty of lack of due diligence; that the exception clauses in the bills of lading were limited to losses or damage where there was no negligence on the part of the shipowner and that if there was a clause exempting the shipowner from liability for loss or damage resulting from negligence it would have been null and void under Art. III of the Hague Rules.

The other case where the meaning of "discharge" was in issue is *Falconbridge Nikel Mines Ltd.* v. *Chimo Shipping Ltd.*,[11] a decision of the Canadian Exchequer Court. In this case, a tractor and a generating set which were unloaded from a steamer on to a barge to take them ashore, fell overboard from the barge and sank. The plaintiffs as owners claimed damages from the defendant carriers alleging negligence and breach of contract to deliver the equipment. The defendants denied liability. It was held by the court that the cargo slid off the barge while in the custody of the defendants; that the defendants were negligent in failing to ensure that the equipment was adequately secured and that as the defendants carried barges for use in lightering cargo and were bound to lighter the goods by the contract of carriage, the lightering should be considered as a part of the discharging operation and the Rules should apply to it. Kerr J. said, at page 296: —

"In the present case the carrier carried barges on the Crosbie for use in lightering cargo from that ship to shore, and it used the barges for that purpose. It was bound to lighter

the goods by its contract of carriage. In that situation, it is my view that the Rules applied to the lightering. The lightering should be considered as a part of the discharging operation, but even if the discharging of the goods concerned from the Crosbie was completed when they were put on the barge, the barge was a ship used by the carrier in performing its obligation to carry the goods by water under the contract of carriage covered by the bill of lading and consequently, in my view, the Rules applied to that portion of the carriage."

In the present case the first defendants' obligations included the operation of "discharge". The Hague Rules make them liable for losses sustained during that operation. The cases show that "discharge" no longer means "release of the goods from the tackle of the vessel named in the bill of lading". In my judgment, both on principle and authority, the line should be drawn, not when the goods leave the ship, but when the carriage by sea is concluded. The first defendants discharged the goods into lighters for some reason best known to them. They apparently did so to suit their own convenience. In those circumstances, in my opinion, the carriage by sea had not yet been concluded when the goods were in the lighters and were damaged by rain water. In my judgment the Hague Rules continued to apply whilst the goods were in the lighters. And under Art. III Rule 2 the first defendants were under a duty to see that the lighters were seaworthy, properly equipped and properly handled. There was a clear duty to "properly and carefully care for" the goods while they were in the lighters. As the damage resulted from lack of care on the part of the lightermen, the first defendants were liable for the damage.

As regards the submission of counsel for the first defendants that his clients were not liable because it has never been expressly decided that a ship is responsible for the lighterage phase under the Hague Rules, it may be that there is no previous decision fitting the facts of this case, but that in my opinion is no answer. Where the court finds that in order to do justice between the parties, the facts warrant the breaking of new ground and the law permits it, the court should not hesitate to do its duty.

In my judgment the Hague Rules continued to apply whilst the goods were in the lighters and therefore I did not consider it necessary to examine the question whether the exceptions printed on the back of the bills excluded the first defendants' liability for losses suffered during lighterage. If the exceptions are wider than those conferred by the Rules, they are nullified by Art. III A, Rule 8.

The final question which I had to decide in this case was, whether the first defendants were entitled to an indemnity from the second defendants in respect of all the monies which the first defendants were called upon to pay to the plaintiffs in respect of the "Jens" cargo. In my opinion they were so entitled, on the authority of *The Winkfield*,[12] and *Gilchrist Watt Ltd.* v. *York Products, supra.*

It was for these reasons that the following judgments were entered in this case: —

(1) Judgment for the plaintiffs against the first defendants in respect of the "Lars" cargo for $56,298.80 and interest thereon at 8% per annum from the 7th October 1968 to date of judgment and costs as taxed.

(2) Judgment for the plaintiffs against the first and second defendants in respect of the "Jens" cargo for $26,845 and interest thereon at 8% per annum from the 7th October 1968 to date of judgment and costs as taxed.

(3) Judgment for the first defendants against the second defendants in respect of all monies paid by them to the plaintiffs in respect of the "Jens" cargo and costs as taxed.

(4) The plaintiffs' claim against the second defendants in respect of the "Lars" cargo was dismissed with costs.

Order accordingly.

Solicitors: *Allen & Gledhill; Drew & Napier; Hilborne & Co.*

DOBB & CO. LTD. v. HECLA

[A.C.J. (Winslow J.) September 19, 1973]

[Singapore — District Court Appeal No. 11 of 1973]

Tort — Negligence — Contractor responsible for erection of scaffolding in front of high building — Scaffolding in dangerous condition — Whether contractor liable in damages to workman of another contractor working on the same premises — Duty of one invitee to another invitee — Workmen's Compensation Act (Cap. 130), s. 20(b) — Workmen's Compensation Regulations, 1955.

The question in this case was whether an independent contractor responsible for the erection of scaffolding in front of a high building is liable in damages to the workman of another independent contractor responsible for the erection of scaffolding at the back of the same building in respect of injuries suffered by the workman whilst using the scaffolding in front which was in a dangerous condition and collapsed while so used. The appellants had paid compensation to the workman under the Workmen's Compensation Act and claim an indemnity from the respondents, the contractors responsible for the scaffolding at the front of the building. The learned district judge held that there was no evidence that the respondents knew that the appellant's workers or any others apart from their own workers used the scaffolding in front. He therefore held that the respondents owed no duty of care to the workman. The appellant appealed.

Held: (1) a person who though not an occupier of premises actually creates a danger and has reason to expect other persons will be lawfully on the premises during the existence of that danger owes them a duty to take reasonable care. In this case the respondents gave no evidence to show that the right to use their scaffolding was confined to their own workmen or that others were excluded and it was clear from the evidence that both the appellants and the respondents and their respective workmen were invitees on the premises;

(2) the respondents by their failure to repair or remove their dangerous scaffolding after being repeatedly warned by the architect to do so created a situation which they could reasonably forsee would be likely to injure persons like the workman in question who clearly fell within the proximity rule.

Cases referred to:-

(1) *Kimber* v. *Gas Light & Coke* [1918] 1 K.B. 445.

(2) *Hawkins* v. *Thames Stevedore Co.* [1936] 2 All E.R. 472.

(3) *Miller* v. *Smith of Scotland Electricity Board* [1958] S.C. (H.L.) 37.

(4) *Donoghue* v. *Stevenson* [1932] A.C. 562.